No. 02-1259

Supreme Court, U.S.
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In The

# Supreme Court of The United States

October Term, 2002

RICHARD STEVENS,

*Petitioner,*

- against -

DEPARTMENTAL DISCIPLINARY COMMITTEE for the APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

*Respondent.*

*Petition for a Writ of Certiorari to the Court of Appeals of the State of New York*

## SUPPLEMENTAL BRIEF

**RICHARD STEVENS**
*Petitioner pro se*
221 West 82nd Street
New York, New York 10024
(212) 724-7721

*March 19, 2003*

***Appeal Press*** - (914) 761-3600 (212) 267-6602 (516) 872-1110 (9699)

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The petition for certiorari in the case at bar was signed on February 12, 2003 and filed on February 18, 2003. It was docketed on February 27, 2003. [ see Appendix A; No. 02-1259, hereinafter petition]. It is still pending. Respondents waiver was received by petitioner on March 17, 2003. [ see *App. E at 4a* attached hereto]. As such, they have at this juncture implicitly admitted that there is no "misstatement of fact or law" that was set forth in the petition of February 12, 2003 . [ Rule ¶ 15.2].

After the petition in the case at bar was served, this Court accepted a new case on February 24, 2003. [ *Raytheon Company* v *Hernandez*, No. 02-749, 71 U.S.L.W. 3367; __S. Ct. __ (2003) see Point I *infra* page 1-2 see Rule ¶ 15.8].

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## SUPPLEMENTAL POINTS IN SUPPORT OF PETITION

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## POINT I

***I. This Court granted leave to appeal in Raytheon Company v Hernandez, # 02-749, on February 24, 2003. Neurological impairment leading to qualified disability is sharply distinguishable from drug dependency.***

Neither alcoholism nor any form of drug addiction in 1997, 1985, nor at the present moment, was, or is, at issue in the instant petition for review. Congress excludes persons with drug dependency from the rights that citizens are provided for by the Equal Opportunity For Individual with Disabilities Act of 1990. [ see i.e. 42 U.S.C. ¶ 12111(8) and 42 U.S.C. ¶ 12131 (2)]. A citizen's right to call an expert medical witness to establish a person's qualified neurological disability is separate and apart from calling a medical expert for purposes of rehiring an employee who had a drug dependency while employed. The former most certainly falls within ¶ 5 of the Fourteenth Amendment. [ see i.e *City of Boerne* v *Flores*, 521 U.S. 507, 526 (1997) at Point II (A) (i) (c) page 21 of petition dated February-12, 2003].

In this regard, it was the referee's position that "consent" was "irrelevant".[ see TRH* 308-309 and TRH * 348, attached hereto *at Appendix B, at page 180a*]. This was found in other cases in New York which dealt with the withdrawal of funds from escrow accounts when "alcoholism" was the underlying reason for the attorney's disposition. [ see Point I [A] [vi] pages 16-18, citing i.e. *Matter of Kadish,* 299 A.D. 2d 78 (2002) at page 18, ft. note 9]

This further supports the instant petition as it raises an " important question of statutory construction"and the "administration of a Congressional Act" namely the ADA. [ see ¶ 4.4 page 171, Supreme Court Practice, Seventh Edition, (1993) by Stern Gressman, Shapiro and Geller, citing *Shapiro* v *United States*, 335 U.S. 1, 4 (1948); *Minnesota Mining Co.* v *New Jersey Wood Co.*, 381 U.S. 311, 314 (1965)].

**POINT II**

**II:** ***Important similar issues already pending before the Supreme Court in Hason is still applicable. The factual and legal backgrounds of these two cases are interrelated but lead to diametrically opposite results. Neither issue preclusion, the Younger or Burford abstention principles, nor the Eleventh Amendment, apply at bar, as they do in Hason. Summary disposition and/or postponing consideration of the present matter is now warranted under Rule 16.1.***

Oral arguments in the Hason matter is scheduled to be heard on March 25, 2003. This nullifies corroboration but does not preclude summary disposition of the instant petition.

> "Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant

the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision." [Supreme Court Practice, Seventh Edition, (1993) Stern, Gressman, Shapiro and Geller, ¶ 4.16 at pages 192-193 citing ¶ 5.9 at pages 243-244 "deferring consideration of petition, citations omitted ].

The abstention and preclusion doctrines set forth by this Court are "strong policy" considerations imposed by the judiciary that are 'subsidiary' to the Eleventh Amendment question of sovereign immunity and whether the dismissal of the complaint by the District Court in Hason was proper. [Rule ¶ 14.1; *Ohio Civil Rights Comm'n.* v *Dayton Schools*, 477 U.S. 619, 626 (1986)]. One distinguishing point raised by petitioner in the present petition is that the principles of abstention, issue and claim preclusion, and the Eleventh Amendment, bar Dr. Hason from proceeding under 42 U.S.C. ¶ 1983.

"For Younger [and or Burford], the State's trial and appeals process is treated as a *unitary system*." Applying this principal after the administrative proceeding was abandoned, was earmarked by petitioner as a case of first impression [ emphasis added *Nopsi III*, 491 U.S. 350, 369, ft. note 4 (1989), "never squarely faced", see Point II (A) (ii) pages 24-26 of petition dated February 12, 2003].

The present matter is a direct appeal under 28 U.S.C. 1257, not a separate federal matter after a final finding by an administrative proceeding as the Hason case entails. As the trier of fact never reviewed petitioner's expert evidence, and as this is brought to this Court's attention without abandoning the state appellate process, these points are properly before this Court under 28 U.S.C. ¶ 1257.

The opposite conclusion is warranted in the Hason matter. [ see Point II of petition dated February 12, 2003, pages 18-26] *Younger and/or Burford* would apply in Hason, warranting the" outright dismissal" by the district

court. [see page 26 of petition dated February 12, 2003, citing *Gibson v Berryhill*, 411 U.S. 564, 577 (1973)].

Of parallel import is that this Court made clear that common law issue and claim preclusion applies to unreviewed administrative proceedings when brought under 42 U.S.C. ¶ 1983. " The legislative history of ¶ 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion"[ see *University of Tennessee* v *Elliot*, 478 U.S. 788, 794, 796-797 (1986); see Point II (A)(I)(c) page 21 of petition dated February 12, 2003]. This applies to the Hason matter as far the findings made by the California Medical Committee. [ see i.e. *In the Matter of Michael Hason*, 295 A.D. 2d 818, 820, 821, 822, Third Dep't (2002) acknowledging collateral estoppel to medical adjudication by the California Administrative Review Board with psychiatriac expert testimony submitted on petitioner Hason 's behalf] [1]

The antithesis holds true in the instant case. The underlying disciplinary proceeding at bar is divided and or "***bifurcated***" into two distinct and separate hearings. This is what the New York statutes and/or "**rules**"to the disciplinary hearings set forth, as admitted to by the referee. [ emphasis added, see TRH 349* line 19-TRH 350 line 11, at *App. C*, attached hereto]. [2]

Preclusion only applies " *where the matters put in issue in the first suit were the same as the matters in issue in*

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[1] In no fashion is *Hason* an employee of the State warranting a *trial de novo* as would be the case for an employee who raises a Title VII cause of action. [ *University of Tennessee* v *Elliot*, *supra*, at 795]

[2] Furthermore, as set forth in the petition of February 12, 2003, the two hearings are not mutually exclusive, as the mitigation hearing can literally result in a complete reversal of the findings made at the fact-finding. [ see Point I [a][ii] page 7 ft. note 3 of petition dated February 12, 2003, and i.e. ¶ 22 N.Y,C.R.R. 603 (p) (1) cited therein]. This Court may "request a response to the petition, even though the time for filing has elapsed". [ see Supreme Court Practice, Seventh Edition, (1993) Stern, Gressman, Shapiro & Geller, *supra*, ¶ 6.37 at page 375].

*the second*". [ emphasis added cf. *Cromwell* v *County of Sac.* 94 U.S. 351, 370 (1876)]. As this was not the case in the present matter, neither *res judicata*, nor the common law doctrine of issue and claim preclusion are viable. This too is diametrically opposite to the Hason case.

Lastly, Congress does have the power to pass nationwide statutes in the field of disabilities under ¶ 5 of the Fourteenth Amendment, but does not have the power to abrogate the State's Eleventh Amendment sovereign immunity. [ see Point II[a] [i] [c] pages 21-23 of petition for certiorari dated February 12, 2003]. [3]

The foregoing points factually and legally interrelate and distinguish the Hason matter with the present petition. This raises common questions of fact and law concerning the parameters of the ADA and when they do and or do not apply. [ Rule 27(3); see petition dated February 12, 2003, Point II (A) (ii) page 26, citing Supreme Court Practice, Seventh Edition, (1993) Stern, Gressman, Shapiro and Geller, ¶ 14.6 at page 580].

The Court may reverse Hason, and may summarily reverse the underlying judgment to the pending petition in light thereof. [ see Rule 16.1, and ¶ 5.12 at pg. 246 & ¶ 5.10 pages 243-244, Supreme Court Practice, Seventh Edition, (1993) Stern Gressman, Shapiro and Geller, further citations omitted].

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[3] The petition of February 12, 2003, mistakenly cited "App. D at 33a" as the basis for finding that petitioner was "inadequate"in his representing Levine in 1993-94. [ at page 24 of petition]. The correct citation is *App. B,* at *App. 13a.*

Secondly, the use of the word "stalling" as a tactic by the referee with respect to petitioner is not at App. D at 34a as set forth on page 7 ft. note 3. Rather, it is at TRH 403* lines 1-6 which is attached hereto in *App. D at 3a.*

Lastly, appendix S to the petition of February 12, 2003, [ *App. 179-180a* ] did not properly separate the exact pages of the transcript. It is now properly attached hereto in Appendix B. [ referred to at Point I [a][vi] pages 16-18 of petition dated February 12, 2003, *supra* page 1 ].

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in Points I; II and III of the petition dated February 12, 2003, it is respectfully requested that the petition, together with the order to show cause, be granted.

Respectfully submitted,
Richard Stevens
221 West 82nd Street
New York NY 10024
(212) 724-7721

Dated: March 18, 2003

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 18, 2003

Mr. Richard Stevens
221 West 82nd Street
New York, New York 10024

Re: Richard Stevens
v. Departmental Disciplinary Committee for the Appellate Division, Supreme Court of New York, First Judicial Department
No. 02-1259

Dear Mr. Stevens:

The petition for a writ of certiorari in the above entitled case was filed February 27, 2003 as No. 02-1259.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

William K. Suter,
Clerk

by

Sandra Elliott Spagnolo
Assistant

Enclosures

TRH 47 –

REFEREE: I don't want your testimony now. I want it under oath.

STEVENS; Okay, I will give it to you under oath.

REFEREE: But then don't give it to me now.

STEVENS: All right, I won't . The point is that there was an account, there was an agreement, that there was, the time is documents, that I was partially successful on this case, that six months after the bill, she wakes up one morning and says there's no written retainer agreement and claims she overpaid me and Stan Chovnick. That was her entire basis six months afterwards. This section of the Disciplinary Rules states: " The portion belonging to the lawyer or law firm may be withdrawn when due". This was the entire issue, 9-102 (b) (4).

REFEREE: It's settlement money. That's when an insurance draws out a check to the lawyer and the client, is deposited in the escrow account, and there is a written retainer. That's what it's applicable to. It's not applicable to your just being to use self-help to withdraw money from an escrow account.

TRH 302 --

REFEREE: That's no defense, because – go ahead.

WITNESS: If it is not an absolute defense, it certainly mitigates the intent.

REFEREE: That may or may not be if we get into the issue of sanctions, but on the issue of liability, which is where we are now, we're

not at sanctions, what, of what possible relevance is there ?

WITNESS: Liability to who, the bonding company ?

REFEREE: No, no, no, liability to the, to the bar, to the Disciplinary Committee, to the Appellate Division for having violated the Code of Professional Responsibility.

TRH 308-309

WITNESS: The only possible persuasion that I have is that hopefully the evidence will demonstrate that I had the approval, right, of Ms. Thompson.

REFEREE: I'm sorry, it's irrelevant as a matter of law.

TRH 348:

STEVENS: All right

REFEREE: I seem to have great difficulty in communicating. You know, I've been practicing law a long time, and it has not been that difficult for the most part.

STEVENS: Right.

REFEREE: But please, understand that if the retainer agreement, in my view at this point in time, and you can in a brief persuade me otherwise, that if the retainer agreement was $ 1,000 per hour, and you had put in 100,000 worth of work or $ 3,000,000.00 you still would not be entitled under the law to withdraw that money from the escrow for your own personal purposes. Now, if you would with which to dissuade me of this stuff about Chovnick and or 200 or 100 just is irrelevant.

TRH 50

STEVENS; The point is that the attorneys fees were due, that account stated was set forth. She does not have a right to come up with dome kind of, and he consented.

REFEREE: And you claim you had a right to of self-help, is that your defense.

STEVENS; No, that is not my defense. That is not unequivocally my defense. My defense is is that there was, that the attorney's fees were due and that she consented to the, to my withdrawing the finds. That is my defense.

REFEREE: Well, if she consented to your withdrawal of the funds, that's one thing, but that does not take care of the problem with the bonding company.

*TRH 349 line 19 - TRH 350 line 1 - 11*

REFEREE; it would be incumbent upon me to thereafter consider evidence in mitigation or aggravation before I recommend to the Appellate Division whether you should be admonished, censured, suspended or disbarred. In that connection come of this may or may not be relevant. In connection with this part of the proceeding which under the rules is a bifurcated proceeding ----

STEVENS: Okay

REFEREE: it's not relevant. And your're just taken up, we've taken up, apart from your brother's testimony, we've take up two more hours –

STEVENS: Okay.

REFEREE: of everybody's time

STEVENS: All right. If it's bifurcated, then I'm sorry. In –

REFEREE: Don't be sorry. It's what the rules says.

*Appendix D 3a*

TRH 403

Stevens: I understand that.

Referee: You've had plenty of time to assemble witnesses, documents. As a matter of fact, I'm going to say on the record that you leave the impression that you're stalling and have been stalling for months.

DEPARTMENTAL DISCIPLINARY COMMITTEE
SUPREME COURT, APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT
61 BROADWAY
NEW YORK, NY 10006

(212) 401-0800
Fax: (212) 401-0810

March 11, 2003

PERSONAL & CONFIDENTIAL

Honorable William K. Suter
Clerk
Supreme Court of the United States
1 First Street, North East
Washington, D.C. 20543

Re: Matter of Richard Stevens

Dear Mr. Suter:

I am Deputy Chief Counsel in the office of Thomas J. Cahill, Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department (the "Committee"), respondent in the above matter.

This letter is submitted in lieu of a brief and in opposition to petitioner Richard Stevens' ("petitioner") petition for a writ of certiorari from the decision of the Supreme Court of the State of New York, Appellate Division, First Department, entered on May 16, 2002, disbarring respondent from the practice of law. For the reasons stated below, the Committee submits that respondent's arguments present no valid "constitutional"

question, provide no viable rationale for this Court's jurisdiction and, for that matter, provide no basis for granting such relief. His petition should be denied.

In a detailed memorandum opinion, (see Appendix D of petitioner's petition), the Appellate Division, First Department, described both respondent's misconduct (including intentional conversion of client funds) and the reasons why that Court disbarred him. All of the respondent's arguments, and his attempted rehash of the merits of the case against him, were specifically addressed by the Referee, the Hearing Panel, and the Appellate Division, First Department. Further, petitioner's arguments were twice rejected by the New York Court of Appeals, which denied his motion for leave to appeal on September 9, 2002 and denied his motion to reargue on November 19, 2002. (See petitioner's Appendix A.)

Shorn of all pretense, respondent's petition should be taken for what it is, namely, an attempt to burden this Court with a groundless review of the State of New York's Appellate Division, First Department's sanctions against respondent for blatant, unambiguous professional misconduct. Petitioner's turgid thirty page "petition" fails to remotely state any coherent basis for the Supreme Court of the United States to entertain such a request. This is especially true when, as here, the record is so thorough and respondent's egregious misconduct so firmly established.

As stated by the Appellate Division, First Department, on page 14 of its Memorandum Opinion, "[A] review of respondent's exhaustive and often difficult to understand filings reveals that he is still unaware of the seriousness of his misconduct and believes that he has done nothing wrong." Respondent's submission to this Court is more of the same. It further demonstrates not only the correctness of the Appellate Division's decision, but also that a threat to the public was removed by respondent's disbarment.

The Committee therefore respectfully requests that the instant petition be denied in its entirety.

Respectfully yours,

Andral N. Bratton

cc: Richard Stevens